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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

C. WILILAM GUY, Plaintiff and Appellant, v. GREGORY JORDAN, Defendant and Respondent.	B172245 (Los Angeles County Super. Ct. No. BC270806)

APPEAL from a judgment of the Superior Court of Los Angeles County, Irving S. Feffer, Judge. Reversed and remanded.

Berman, Berman, Berman, William M. Aitken; Konicek and Dillon, Thomas W. Dillon and Daniel F. Konicek for Plaintiff and Appellant.

Johnson, Poulson, Coons & Slater, Lynn O. Poulson and Susan Broberg for Defendant and Respondent.

Plaintiff and appellant C. William Guy appeals the summary judgment entered in favor of defendant and respondent Gregory Jordan. As Guy's libel claim was not barred by the litigation privilege, an attorney privilege against suit, or the statute of limitations, and because a disputed issue of material fact exists with respect to the element of publication, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Guy and Timothy Goodwin, executives and owners of the stock of Cornerstone Board Services, Inc., were in frequent conflict over business decisions. At Goodwin's petition, the superior court appointed a provisional director to Cornerstone's board; immediately thereafter, the provisional director and Goodwin voted to terminate Guy from all corporate offices, from the board of directors, and from his employment with Cornerstone. Goodwin then wrote a press release announcing the termination. He sent it to his attorney, Jordan, for review. Jordan made some changes to the document and returned it to Goodwin, who finalized and distributed it.

The press release read in pertinent part as follows, with the allegedly libelous sections italicized:

"*C. William Guy has been terminated as Chairman, CEO and Director of Cornerstone Board Services, Inc. dba Cornerstone International Group, for abuse of corporate assets, misappropriation of company funds, misrepresentation of material facts, misleading the media and Cornerstone International Group member firms.*

"Appropriate documents were filed March 29th, which *Judge Laura A. Matz of the Los Angeles Superior Court ruled in favor of the petitioner Timothy Goodwin, the corporation's President and Board Member. The ruling included relief that led to former Chairman C. William Guy's removal.* Additionally the court ordered the appointment of a provisional director to ensure that shareholders and creditors are protected to the fullest extent of the law.

. . .

"*Several attempts were made to contact Mr. Guy directly through his attorney Mr. Michael Hayward. Mr. Hayward stated that his client was unavailable.*"

Guy sued Goodwin and others for libel and other torts. When he later learned that Jordan had edited the press release prior to its distribution, Guy amended his complaint to name Jordan as a defendant in the libel claim in place of one of the Doe defendants. The trial court granted summary judgment for Jordan on the libel cause of action on four grounds: Guy could not establish that Jordan published the allegedly libelous press release; Jordan could not be held liable to a third party for advice he had given to his client; the publication of the press release was protected by the litigation privilege; and the claim was barred by the statute of limitations. Guy appeals.

DISCUSSION

On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

A. Publication

Libel is a form of defamation. (Civ. Code, § 44.) "One of the elements of the tort of defamation is 'publication.' In general, each time the defamatory statement is communicated to a third person who understands its defamatory meaning as applied to the plaintiff, the statement is said to have been 'published,' although a written dissemination, as suggested by the common meaning of that term, is not required." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.)

"[E]ach person who takes a responsible part in a publication of defamatory matter may be held liable for the publication." (*Shively v. Bozanich, supra,* 31 Cal.4th at p. 1245; see also *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 852; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549.) Applying this standard, an individual who made a financial contribution toward a political mailer but who was not alleged to have participated in the mailer, to have known of its contents before it was published, or to have held a position in the organization from which his oversight of campaign literature could be inferred, did not play a responsible part in the mailer's publication and was not liable for defamation. (*Matson*, at p. 549.)

The trial court based the summary judgment on Jordan's argument that Guy had not established the requisite facts to support a cause of action for libel against Jordan because he had not demonstrated that Jordan published the allegedly defamatory statements in the press release. After a review of the parties' separate statements and supporting evidence, we conclude that whether Guy played a responsible part in the publication of the press release is a disputed issue of material fact that precludes summary judgment.

In Jordan's separate statement of undisputed facts, he alleged two facts pertinent to the issue of publication: "Goodwin prepared the press release with only the help of David Charlson; Jordan only made certain corrections," and "The press release was published by Goodwin." Guy contested these factual assertions, contending that "Jordan made substantive additions and editing to the text of the press release," and "Jordan made additions and edits to the Press Release and sent such changes to Goodwin to incorporate into a final draft for publication. Jordan took a responsible part in the publication of the press release. Jordan knew that the press release would be published by Goodwin." Jordan cited to four pages of Goodwin's deposition to support these contentions; Guy relied on the same four pages of testimony, as well as the draft press release with Jordan's edits and one other passage from Goodwin's deposition.

We have examined the evidence relied upon by the parties to support their contentions. Even assuming that Jordan's showing was sufficient to meet his initial burden of making a prima facie case that the publication element could not be established (Code Civ. Proc., § 437c, subd. (p)(2)), the limited evidence submitted by the parties demonstrates that it is a disputed issue of material fact whether Jordan played a responsible part in the publication of the press release. Goodwin testified that he prepared the initial draft of the release with Charlson, but he also testified that "[i]t was reviewed by Greg Jordan," that he had sent it to Jordan for approval before publishing it, and that Jordan "responded with corrections that he had marked" on the document. Goodwin also testified that after he received the marked-up draft from Jordan, he put it in final form with the understanding that he was finalizing it "with Mr. Jordan's blessing," and that Jordan knew what Goodwin intended to publish. Guy's evidence, viewed in the light most favorable to him, is that Jordan participated in the process of drafting the statement and knew of its contents before it was published—the "preparation, review, or publication" the court looked for to determine whether the defendant took a responsible part in publication in *Matson v. Dvorak*, *supra*, 40 Cal.App.4th at p. 549. Because Guy submitted admissible evidence to satisfy his burden of showing that a triable issue material fact exists as to the element of publication, it was error for the trial court to grant summary judgment in Jordan's favor on this ground. (Code Civ. Proc., § 437c, subd. (p)(2).)

Jordan argues in the alternative that he has a complete defense to the defamation claim because he had no knowledge that any statements in the press release were false, and Guy did not prove he knew they were false. This claim fails for several reasons. First, when a defendant moves for summary judgment on the basis of an affirmative defense, it is his or her burden to establish that he or she has a complete defense to a cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Jordan did not present evidence to support a lack of knowledge defense—his separate statement is devoid of statements of fact asserting that he was unaware of any possible falsities in the press release, and there

is no evidence in the record to support the assertion in his appellate brief that he did not know that the allegedly false statements were false. Second, Jordan misstates the law by selectively quoting from *Osmond v. EWAP, Inc*, *supra*, 153 Cal.App.3d at p. 852. Innocence is a defense to a libel claim *only* for a distributor of another's libel, not for one who took a responsible part in its publication: "One who merely plays a secondary role in disseminating information published by another, as in the case of libraries, news vendors, or carriers, may avoid liability by showing there was no reason to believe it to be a libel. . . . [I]nnocence is generally considered a defense where such defendants merely circulate another's libel unless 'they knew or should have known' of the defamatory nature of the material." (*Ibid*.; see also 5 Witkin, Summary of Cal. Law, Torts (9th ed. 1988) §§ 554-555, pp. 651-652 ["innocence or good faith of the defendant *who makes a defamatory statement* is not a defense . . . . [¶] . . . [¶] Innocence is generally considered a defense where the defendant merely *circulates another's libel*"].) As there exists a triable issue of material fact as to whether Jordan took a responsible part in the publication of the allegedly defamatory statements, this defense is not merely unproven, it is also not a complete defense to this libel claim. The summary judgment cannot be upheld on this basis.

Next, Jordan argues that the statements in the press release regarding Guy's termination were non-actionable statements of opinion. (*Gregory v. McDonnell Douglas Corp*. (1976) 17 Cal.3d 596, 601 ["what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion"].) At the direction of the United States Supreme Court, the categorical distinction between statements of fact and opinion has been replaced by an inquiry into whether, under the

totality of the circumstances, the statements declares or implies a provably false assertion of fact. (*Milkovich v. Lorain Journal Corp*. (1990) 497 U.S. 1, 17-20; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375.) Under these circumstances, the press release clearly makes factual declarations. It asserts, without hedging or any context suggesting that this is merely an advocacy piece, that Guy was terminated by the board of directors for "abuse of corporate assets, misappropriation of company funds, misrepresentation of material facts, [and] misleading the media and Cornerstone International Group member firms." The typical audience is not likely to construe a press release announcing that legal action had resulted in the naming a provisional director to the board and that the board had removed the company's CEO and chairman as a puff piece opining about misconduct—instead, a reader would more likely believe that these actions were taken because the misconduct had been proven to the satisfaction of the board. Particularly given that the action was permanent and had already been taken, there is nothing in the language or context of these statements that remotely suggests a statement of opinion. Similarly, the characterization of the court action and ruling are assertions of fact. Although whether any of these statements is actually defamatory has not been determined, as a matter of law, they convey factual imputations regardless of whether they are characterized as fact or opinion.

B. Litigation Privilege

The trial court also granted summary judgment on the basis of the litigation privilege. The absolute litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The litigation privilege did not apply here for several reasons. First, the communications were not made in connection with judicial proceedings. "[T]he critical question is the *aim* of the communication, not the forum in which it takes place. If the communication is

made 'in anticipation of or [is] designed to prompt official proceedings, the communication is protected.' [Citation.]" (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368.) Nothing about this press release was connected to judicial action; it proclaimed Goodwin's success in obtaining the appointment of a provisional director in the context of the press release's larger purpose of announcing that Guy had been removed from office at Cornerstone. While the litigation privilege extends to out-of-court actions when they are made to prompt governmental action or in the course of court proceedings to achieve the objects of the litigation (*id*. at p. 361), Jordan has offered no authority, nor are we aware of any, that extends the privilege to post-litigation circumstances such as those here.

The litigation privilege also does not apply here because the statements in the press release cannot be considered to have been made to achieve the objects of the litigation, for the objects of the litigation had already been achieved. Moreover, the statements had no logical relation to the action. (*Silberg v. Anderson*, *supra*, 50 Cal.3d at pp. 219-220 ["The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action"].) Public announcement of the actions of the newly-appointed provisional director and the board to oust the chairman is extraneous to a concluded suit seeking the appointment of that provisional director. (Cf. *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1147 ["communications which only serve interests that happen to parallel or complement a party's interests in the litigation" are not in furtherance of or connected to litigation].) Moreover, communications to nonparticipants in the action, as here, are generally not protected by the litigation privilege. (*Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 93 [expert witness's comments about the case to the press were not covered by the litigation privilege].) The trial court erred when it granted summary judgment on the basis of the litigation privilege. (See *Rothman*, at p. 1149 ["the litigation privilege should not be extended to 'litigating in the press'"].)

C. Attorney Privilege

A third basis for the summary judgment was Jordan's claim that as an attorney, he could not be sued for the advice he gave his client because he owes a duty to his client alone. One of the three cases on which Jordan relies, *Norton v. Hines* (1975) 49 Cal.App.3d 917, 921-922, stands for the principle that attorneys do not owe a general duty to a third party to exercise reasonable care in advising their clients and may only be sued for malicious prosecution, not negligence, for representing a client in a nonmeritorious lawsuit. This case is inapposite, for the libel suit here is premised not on the advice Jordan gave to his client, but on Jordan personally taking a responsible part in the publication of a defamatory press release. Attorneys do not have blanket immunity from defamation claims by virtue of their role as counsel when they take a responsible part in publishing defamatory statements that are not covered by the litigation privilege. (See, e.g., *Rothman*, *supra*, 49 Cal.App.4th 1134.)

Jordan's other two cases to support his claim for attorney immunity from suit, *Izzi v. Rellas* (1980) 104 Cal.App.3d 254 and *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, concern the Civil Code section 47 litigation privilege as applied to attorneys. As we have already concluded that the litigation privilege does not apply here, these cases are of no avail in establishing immunity from suit. The summary judgment cannot be upheld on this ground.

D. Statute of Limitations

The final basis on which the court granted summary judgment is the statute of limitations. Defamation claims have a one year statute of limitations. (Code Civ. Proc., § 340, subd. (c).) The limitations period began running on the date of publication: March 30, 2001. (*Shively v. Bozanich*, *supra*, 31 Cal.4th at p. 1237.) Jordan argued that the statute of limitations barred the libel claim against him because he was not substituted into the litigation in place of a Doe defendant until December 10, 2002. Jordan's showing, however, was insufficient to meet his initial burden of making a prima facie

case that the libel claim was barred by the statute of limitations, for he failed to submit evidence from which the court could determine whether the complaint, amended to identify Jordan in place of a Doe defendant, related back to the original complaint. Even if Jordan's showing had been sufficient to shift the burden of demonstrating that the claim was not barred by the statute of limitations, Guy submitted evidence of material facts in dispute that precludes summary judgment on the statute of limitations.

The relation back doctrine provides that when a plaintiff is unaware of the true name of a defendant at the time the complaint is filed, that defendant may be designated by a fictitious name and later, upon discovery of the defendant's name or identity, identified in the complaint by name through amendment or substitution. (Code Civ. Proc., § 474.) Under such circumstances, the amended complaint relates back to the original complaint and avoids the bar of the statute of limitations as long as the original complaint stated a valid cause of action against the now-identified Doe defendant; the plaintiff was genuinely unaware of the identity of the defendant or of the facts rendering that defendant liable at the time the action was filed; and the amended complaint, identifying the defendant, is based on the same general set of facts as the original and refers to the same accident and same injuries. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.)

Here, the complaint was filed within the statutory period, named Doe defendants, and was amended to substitute Jordan as a defendant within the three year period for service of summons (Code Civ. Proc., § 583.210, subd. (a).) Guy submitted evidence that he was genuinely unaware of the facts rendering Jordan liable for defamation at the time the complaint was filed—that is, he did not know Jordan had played a responsible part in the publication until Goodwin's October 2002 deposition—but that he amended the complaint after learning of the role Jordan had played. The original complaint stated a defamation cause of action against the Doe defendants and was not altered by amendment to refer to other facts, accidents, or injuries. Under these circumstances,

Jordan has not established a complete defense to the libel claim based on the statute of limitations, and the summary judgment cannot be affirmed on this ground.

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings not inconsistent with this opinion. Appellant shall recover his costs on appeal.

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ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.